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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21.03.2005

Coram:

The Honourable Mr.Justice MARKANDEY KATJU, Chief Justice

and

The Honourable Mr.Justice F.M.IBRAHIM KALIFULLA

R.C.P.No. 8 of 2003

Commissioner of Central Excise,
Chennai I Commissionerate,
Chennai - 34. ::: Applicant

vs

M/s.ITC Ltd.,
Thiruvottiyur,
Chennai - 19. ::: Respondent

Petition filed under Section 35 H (1) of the Central Excise Act, 1944 against the final order No.522/02 dated 30.4.2002 on the file of CEGAT, South Zone Bench, Chennai.

To direct the Customs Excise and Gold Control Appellate Tribunal South Regional Bench of Madras to state a case and Refer the following question of law

"1.Is the Hon'ble Tribunal right in holding that the payment of duty vide PLA No.580 dated 27.10.92 has not been paid voluntarily?

2.Can the letter OC.No.1124/97 dated 02.09.92 of the Superintendent of Central Excise asking the assesses to reverse an amount of Rs.5,98,000/- being irregular Modvat credit availed, and other correspondences in continuation, be considered to have raised a dispute since it is not a SCN issued under Section 11 A? Can the Action of the assessee debiting the said amount vide PLA No.580 dated 27.10.92 be considered payment under protest since no letter filed on that date giving any grounds for payment under protest and subsequently also filed no representation for payment made under protest as per sub-rule 5 Rule 233B?

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3. Can the letter of protest dt. 31.10.92 filed by the assessee can have the retrospective effect of filing protest under Rule 233B?"

against

(A.No.289/96 (M) dt. 8.4.97 on the file of the Commissioner of Central Excise (Appeals), Madras -34) against

(C.No.V./48/18/50/95 RF, dt. 18.3.96 on the file of the Asst. Commissioner of Central Excise, Madrs III Division, Madras -35.

For Applicant ::: Mr.K.Veeragahavan
SCGSC

For Respondent ::: Ms. L. Mythili

O R D E R

THE HONOURABLE THE CHIEF JUSTICE

This is a reference application on behalf of the revenue under Section 35 H (1) of the Central Excise Act, 1944, by which the following questions have been sought to be referred to us for our opinion.

> "1. Is the Hon'ble Tribunal right in holding that the payment of duty vide PLA No.580 dated 27.10.92 has not been paid voluntarily?
>
> 2. Can the letter OC.No.1124/97 dated 02.09.92 of the Superintendent of Central Excise asking the assesses to reverse an amount of Rs.5,98,000/- being irregular Modvat credit availed, and other correspondences in continuation, be considered to have raised a dispute since it is not a SCN issued under Section 11 A? Can the Action of the assessee debiting the said amount vide PLA No.580 dated 27.10.92 be considered payment under protest since no letter filed on that date giving any grounds for payment under protest and subsequently also filed no representation for payment made under protest as per sub-rule 5 of Rule 233B?

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3. Can the letter of protest dated 31.10.92 filed by the assessee can have the retrospective effect of filing protest under Rule 233B? ”

2. Heard the learned counsel for the parties.

3. The facts of the case have been given in the judgment of CEGAT dated 26.04.2002, by which the CEGAT set aside the order of the Commissioner (Appeals), who had rejected the assesse’s claim for refund. The CEGAT by its order directed that the refund be given to the assessee, unless the duty has been passed on to the consumer.

4. The assessee is engaged interalia in the manufacture of Printed Cartons at its factory at Thiruvottiyur, Chennai. It avails modvat credit on various inputs used in the manufacture of printed cartons. Some of the printed cartons are exported without payment of duty under Rule 191BB of the Central Excise Rules, 1944. The revenue was of the opinion that the assessee was not entitled to modvat credit on inputs used in the manufacture of printed cartons, which were removed without payment of duty under Rule 191BB. On repeated request of the department, the assessee expunged the credit so taken on 27.10.92, even though it contended that the credit availed by it was in accordance with law. Within three days thereafter, i.e., on 30.10.92, the assessee intimated the department that this payment was made “under protest”. Subsequently, the department took a view that the inputs used by the assessee for manufacture of goods cleared under Rule 191 BB for exports were entitled to modvat credit. Accordingly, the assessee filed a refund claim for Rs.5,98,944/- on 25.7.95, which had been expunged on 27.10.92. The refund claim was rejected on the ground that the same was time barred under Section 11B of the Central Excise Act, 1944.

5. Section 11B of the Central Excise Act, 1944, as it stood at the relevant time, provided for a period of limitation of 6 months for filing refund claims. However, the proviso to Section 11B (1) states that the above limitation shall not apply where any duty has been paid under protest.

6. The stand taken by the Department was that since the assessee expunged the credit on 27.10.92 without any

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protest on that date, the refund claim made by it was barred by limitation and the proviso to Section 11B(1) does not apply.

7. The Tribunal reversed the judgment of the Commissioner (Appeals), and held that the payment made by the assessee was under protest, and hence there was no limitation to the claim for refund.

8. The Tribunal on a consideration of the facts observed that the question whether the payment vide PLA No. 580 dated 27.10.92 was under protest or not has to be determined after taking into accounts all the facts and circumstances. From the records it appeared that the amount had not been paid voluntarily, but only after several correspondences between the assessee and the revenue in which the assessee had been urging that they are entitled to the benefit of the notification No.33/90 (NT), and that they were also entitled to modvat credit against their despatches. The Tribunal had noted that in similar circumstances, in the case of Sree Baidyanath Ayurved Bhavan Ltd. v. CCE, 1990 (48) ZELT 606), it was held that the payment in that case was made under protest, and this verdict was also confirmed by the Supreme Court. Similarly in Executive Engineer, Workshop Division, Madhya Pradesh Electricity Board v. C.C.E, Raipur, 1997 (95) ELT 445, the Supreme Court observed that the earlier letter of protest for taking out the licence could be considered as a protest for payment of duty.

9. Mr.K.Veeraraghavan, learned senior Central Government Standing Counsel appearing for the Department, relies on paragraphs 93 & 94 of the judgment of the Constitution Bench of the Supreme Court in Mafatlal Industries Limited v. Union of India, 1997 5 SCC 537 . We have carefully perused paragraph-94 of the judgment, and in our opinion does not help the case of the Department. The observation in the said paragraph "any person paying the duty under protest has to follow the procedure prescribed by the rule" does not mean that Rule 233-B could be construed in a narrow, pedantic or hyper technical manner. In our opinion Rule 233-B, as interpreted by the decisions of the Supreme Court referred to above, only mean that substantively there has to be a protest in writing. In the present case, the CEGAT has admitted the correspondences between the assessee and the revenue, and in our opinion that is the substantive protest in writing.

10. On considering all the circumstances, the CEGAT held that the payment of duty in the present case in PLA No.580 dated 27.10.92 was under protest.

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11. As regards the plea of unjust enrichment, the Tribunal observed that if the assessee could show that the duty had not been passed on to the consumer in this case, it would be entitled to refund.

12. We agree with the view taken by the Tribunal. Whether duty has been paid under protest or not is basically a question of fact, and this Court in a reference cannot ordinarily interfere with findings of fact, unless they are based on no evidence or perverse. In our opinion, the findings of the Tribunal cannot be said to be based on no evidence or to be perverse.

13. Mr. K.Veeraraghavan, learned senior Central Government Standing Counsel appearing for the Department has relied on Rule 233-B of the Central Excise Rules, which states: -

> " 233-B. Procedure to be followed in cases where duty is paid under protest:-
>
> (1) Where an assessee desires to pay duty under protest he shall deliver to the proper officer a letter to this effect and give grounds for payment of the duty under protest.
>
> (2) On receipt of the said letter, the proper officer shall give an acknowledgment to it.
>
> (3) The acknowledgment so given shall, subject to the provisions of sub-rule (4), be the proof that the assessee has paid the duty under protest from the day on which the letter of protest was delivered to the proper officer"

14. In our opinion Rule 233B cannot control the full effect of the proviso to Section 11B(1). A rule made under the Act cannot limit a provision in the Act itself. It is well settled that a rule made under an Act will not be valid if it conflicts with or is in derogation to a section in the Act vide (C.I.T v. S. Chinappa Mudaliar, AIR 1969 SC 1068) . Hence a rule should not be construed in a manner that it conflicts with a Section of the Act.

15. The Supreme Court has been consistently taking the view that the procedure under Rule 233B should not be treated in an over technical manner. In India Cements Ltd.

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v. Collector of Central Excise, 1989 (41) E.L.T. 358 (SC), the Supreme Court observed:-

> " A perusal of the letter dated June 11, 1974 clearly shows that all possible contentions which could be raised against the levy of duty on the value of packing material were raised. If this could not be said to be a protest one fails to understand what else it could be. It does not require much time to analyse the contents of the letter. An ordinary reading with common sense will reveal to anybody that the appellant was not accepting the liability without protest. We have no hesitation to holding that the letter was in the nature of protest. That being the position, the question of limitation does not arise for refund of the duty."

16. In the present case, the Tribunal has found that there were several correspondences between the assessee and the revenue, in which the assessee had been urging that they are entitled to the benefit of notification No.33/90 (NT), and that they are also entitled to modvat credit against their despatches. Hence, the facts of the decision of the Supreme Court in India Cements Ltd. v. Collector of Central Excise (supra) are similar to the facts of the present case.

17. In Indian Pistons Limited v. Collector of Central Excise, 1990 (46) E.L.T. 3 (SC) (vide paragraph-10) the Supreme Court observed that Rule 233B of the Central Excise Rules does not prescribe any particular form of protest.

18. In Ex.Engr., Workshop Divn., M.P.Electricity Board v. C.C.E., Raipur (supra) the facts were that the Inspector of Central Excise wrote a letter to the Divisional Engineer, Central Workshop of the Electricity Board stating that since the factory of the Electricity Board had not yet been licensed under the Central Excise Act and the Rules to manufacture the said goods the Divisional Engineer at the Central Workshop was requested to supply the particulars in respect of the goods manufactured in the factory. The said details was sought in order to enable the Excise authorities to recover the excise duty on the goods that were being manufactured in the Central Workshop which

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according to him were liable for payment of excise duty. In reply to the said letter, the Divisional Engineer, Central Workshop, in his letter dated 30.11.1975 took the stand that the Central Workshop at Bhilai was undertaking the fabrication of transmission line towers and the sub-station structures and Line Hardware materials in connection with the power supply in the State of Madhya Pradesh and that the provisions of the Central Excise Rules regarding obtaining licence and payment of excise duty may not be applicable to the Central Workshop. On these facts, the Supreme Court observed:-

> " A narrow interpretation of the said letter would give the impression that the Divisional Engineer was only lodging his protest against obtaining a licence. But, in our opinion, the said letter has to be read as a whole in the context in which the requirement for obtaining licence was being insisted, namely, that the goods manufactured at the Central Workshop were leviable to excise duty under T.I.68, which liability was disputed by the Divisional Engineer. The letter of the Divisional Engineer dated November 30, 1975 must, therefore, be construed to mean that protest was lodged in the said letter both against obtaining the licence as well as against liability to payment of excise duty. In these circumstances, we are unable to agree with the Tribunal that payment of duty was not made under protest. On that view of the matter the impugned judgment of the Tribunal cannot be upheld and has to be set aside."

19. Thus, it is well settled that the meaning of the words "under protest" must not be taken in a narrow and pedantic manner. An overall view of the matter has to be taken, and hence we are of the opinion that the Tribunal has taken a correct view considering the facts and circumstances of the case.

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20. In view of the above, we find no merits in this reference petition and it is accordingly rejected.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

pv/

Copy to:

1.Commissioner of Central Excise,
Chennai I Commissionerate,
Chennai - 34.

2.The Assistant Commissioner of Central Excise,

Madras III Division , MHU Complex , 473, Anna Salai,

Madras

3.The Commissioner of Central Excise (Appeals)

Madras -34

4.The Asst.Registrar,

The Customs Eecise and Gold (Control) Appellate

Tribunal, South Zonal Bench, Shastri Bhavan Annexe Building (F1) 26, Haddows Road, Chennai 600 006

+1cc to Mr.K.Veeragahavan, Advocate Sr 13901

RA (CO)

km/28.3.

R.C.P.No. 8 of 2003

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